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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-5604

ROBERT WILLIAMS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The Supreme Court of Ohio

GERALD A. MESSERMAN
Gold, Rotatori, Messerman
& Schwartz Co., L.P.A.
1100 Ohio Savings Plaza
Cleveland, Ohio 44114

Counsel for Petitioner

October 17, 1977

77-5604

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THE STATE OF OHIO

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The Supreme Court of Ohio

Petitioner, Robert Williams, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this matter on July 20, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, affirming the judgment of the Court of Appeals of Ohio, Eighth Judicial District, County of Cuyahoga, is reported at 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977). The opinion is set out in full in the Appendix attached hereto at pages 16 to 24. The opinion of the Court of Appeals, entered on June 17, 1976, is unreported and appears in the Appendix hereto at pages 25 to 30.

JURISDICTION

The judgment of the Supreme Court of Ohio, affirming petitioner's murder conviction and death sentence, was entered on July 20, 1977. This petition for certiorari is filed within 90 days from the date upon which the decision was rendered. The jurisdiction of this Court is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED

(1) Whether a state supreme court may decline to consider a federal constitutional challenge to an instruction which placed the burden of proving self-defense upon the defendant in a capital case, solely on the ground that the issue was not raised by appointed counsel in the trial court or in the intermediate court of appeals, where the case was tried prior to this Court's decision in *Mullaney vs. Wilbur*, 421 U.S. 684, and prior to the state supreme court's adoption of a rule requiring the state to prove the absence of self-defense beyond a reasonable doubt?

(2) Whether a state supreme court may decline to consider a claim that the defendant in a capital case was denied the effective assistance of counsel, solely on the ground that the claim was not raised previously by appointed counsel whose competence was being challenged?

(3) Whether Ohio's statutory framework for imposition of the death sentence violates due process of law in the following respects:

(a) by relieving the state of the burden of proving guilt beyond a reasonable doubt;

(b) by limiting the mitigating circumstances which the court may consider in determining whether to impose a life sentence rather than a death sentence; or

(c) by depriving the jury of any voice in the sentencing decision and entrusting that decision solely to the court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portion of the Fifth Amendment to the United States Constitution provides:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

The pertinent portion of the Fourteenth Amendment to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code §2901.05(D) provides:

> "'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

Ohio Revised Code §2903.01 provides:

> "(A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code."

Ohio Revised Code §2929.02(A) provides:

"Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars."

Ohio Revised Code §2929.04 provides, in relevant part:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

* * *

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

STATEMENT OF THE CASE

A. History of the Case

On April 10, 1975, petitioner and three others were indicted in Cuyahoga County, Ohio, on charges of aggravated murder (*Ohio Rev. Code* §*2903.01*) and aggravated robbery (*Ohio Rev. Code* §*2911.01*).

Petitioner was arraigned on April 11, 1975 and two attorneys were appointed to represent him. A motion for separate trials of the four defendants was subsequently granted. Petitioner's trial commenced on May 12, 1975 and terminated with a verdict of guilty as charged on May 16, 1975. On June 4, 1975, petitioner was sentenced to death.

The same attorneys who represented petitioner at trial were appointed to represent him on appeal. An appeal was filed in the Cuyahoga County Court of Appeals. The appeal challenged the sufficiency of the evidence, the conduct of the prosecutor, and the constitutionality of the Ohio death penalty provisions. By decision rendered June 17, 1976, the Cuyahoga County Court of Appeals affirmed petitioner's conviction and sentence.

New counsel was appointed to represent petitioner in the Supreme Court of Ohio on January 11, 1977. Counsel in that court challenged the conduct of the prosecutor and the constitutionality of Ohio's death penalty provisions. In addition, the Supreme Court of Ohio was urged to reverse petitioner's conviction on the ground that the trial court had improperly imposed upon the defendant the burden of proving self-defense by a preponderance of the evidence, that the trial court had failed to instruct the jury concerning an essential element of the offenses charged, that the charge to the jury had relieved the state of proving guilt beyond a reasonable doubt, and that petitioner had been denied the effective assistance of counsel by reason of the failure of counsel to object to the erroneous

instruction or to challenge the legality of the search which resulted in seizure of much of the evidence introduced by the state.

By decision rendered July 20, 1977, the Supreme Court of Ohio affirmed petitioner's conviction and sentence. The court rejected all claims asserted for the first time in the Supreme Court of Ohio on the ground that those claims had not been called to the attention of the trial court or of the court of appeals (App. 21-22). The court acknowledged that the prosecutor had engaged in improper cross-examination but held the error to be harmless (App. 23). Finally, the contention that petitioner was denied the effective assistance of counsel by reason of counsel's failure to file a motion to suppress or to object to the court's charge was summarily rejected with this observation:

> "The court need not address these arguments. They are of a constitutional nature and they were not raised in the court of appeals." (App. 23-24).

B. Proceedings at Trial

Petitioner was tried and convicted on charges of murdering one Harry Feldman while committing or attempting to commit aggravated robbery.

At trial, the defense claimed that Feldman was killed when a separately-tried co-defendant, Kenneth Duncan, was attempting to obtain money owed to Duncan by Feldman, that there was no robbery or attempted robbery, and that the shooting of Feldman occurred when Duncan saw Feldman reach for a pistol. Duncan testified at petitioner's trial in support of those contentions (R. 401-415). The victim did have a pistol in his possession (R. 159).

At the conclusion of the evidence, the jury was instructed that the defendant was required to establish self-defense by a preponderance of the evidence (R. 691-693). The trial court defined "reasonable doubt" and "proof beyond a reasonable doubt" as those terms are defined in Section 2901.05 (D) of the Ohio Revised Code.

REASONS FOR GRANTING THE WRIT

I

Petitioner has been convicted of aggravated murder and sentenced to death. A separately-tried co-defendant, Kenneth Duncan, testified at petitioner's trial that he had shot and killed the victim of the alleged crime and that he had done so in self-defense. The issue of self-defense having been raised, the trial court instructed:

> "The burden is upon the defense to establish the defense of self-defense. Such defense must be established by a preponderance of the evidence." (R. 691).

Appointed counsel tendered no objection to the charge and did not challenge the charge in the state court of appeals. Counsel for the co-defendant who admitted the shooting also failed to challenge the instruction at trial, but did challenge the charge on appeal. Duncan's conviction was reversed by the same court of appeals which considered petitioner's conviction.*

Solely on the ground that the charge given had not been challenged at trial or in the court of appeals, the Supreme Court of Ohio refused to consider the issue on appeal. The court observed:

> "It is an established rule of long-standing in this State that a criminal constitutional question cannot be raised in the Supreme Court unless it is presented and urged in the court below. [Citations omitted.]" (App. 21).

---

* *State vs. Duncan,* Cuyahoga County Court of Appeals, No. 35405, decided April 21, 1977 (unreported). On September 9, 1977, the Ohio Supreme Court overruled the state's motion for leave to appeal the decision in the *Duncan* case.

In the circumstances of this case, the decision of the Supreme Court of Ohio is not in accord with applicable decisions of this Court. At the time of petitioner's trial, Ohio had "consistently followed the traditional rule that self-defense must be proved by a preponderance of the evidence." *State vs. Robinson,* 47 Ohio St.2d 103, 351 N.E.2d 88, 93 (1976). That rule remained the law in the State of Ohio until July 21, 1976, when the Supreme Court of Ohio expressly held:

> "In a criminal case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise that defense, and does not have the burden of establishing such defense by a preponderance of the evidence." *State vs. Robinson, supra* (syllabus by the court).

At the time the instruction was given in the trial court, on May 16, 1975, counsel did not have the benefit of the teaching of *State vs. Robinson, supra.* Nor did counsel have the benefit of this Court's decision in *Mullaney vs. Wilbur,* 421 U.S. 684, decided on June 9, 1975. Indeed, at the time counsel filed petitioner's brief in the court of appeals and at the time the court of appeals affirmed petitioner's conviction on June 17, 1976, the law in Ohio clearly supported the charge that was given.

This Court expressly held in *Hankerson vs. North Carolina,* ___ U.S. ___, that *Mullaney* was to be applied retroactively to cases tried before *Mullaney* was decided. Left undecided in *Hankerson* was the issue of what state procedural rules might be employed to insulate an erroneous instruction from attack.

That issue, however, was presumably decided by this Court in *O'Connor vs. Ohio,* 385 U.S. 92, when this Court reversed a decision of the Supreme Court of Ohio which had upheld a criminal conviction, notwithstanding the prosecutor's comment upon the defendant's failure to testify, solely on the ground that there had been no objection to the proscribed comment at trial

or on the defendant's first appeal in the state courts. This Court observed, in language which would appear to be controlling in the identical circumstances of the instant case:

> "We hold that in these circumstances the failure to object in the state courts cannot bar the petitioner from asserting this federal right. * * * Defendants can no more be charged with anticipating the *Griffin* decision than can the states. Petitioner had exhausted his appeals in the Ohio courts and was seeking direct review here when *Griffin* was handed down. Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." 385 U.S. at 93.

Here, petitioner's trial and appellate counsel failed to object "to a practice which Ohio had long allowed." Ohio ceased allowing that practice fourteen months after petitioner was tried and one month after his case was decided by the state court of appeals. The issue was raised in the first proceeding which occurred after the state had repudiated the rule which allowed the defendant to be charged with the burden of proving self-defense. It was raised several months before this Court specifically held in *Hankerson vs. North Carolina, supra,* that *Mullaney* was to have retroactive application to cases tried before *Mullaney* was decided.

If *O'Connor vs. Ohio, supra,* is not considered dispositive of this issue, as footnote 8 of this Court's decision in *Hankerson* might suggest, it is appropriate that certiorari be granted in this case to resolve a federal question of substance not previously determined by this Court. It is evident that a large number of cases may turn upon the question of whether the state may legitimately rely upon a state procedural rule requiring contemporaneous objection to a jury instruction which was valid when given but which will no longer withstand constitutional scrutiny.

II

Petitioner is in an ironic position. Unless this Court takes corrective action, it is highly probable that petitioner will be electrocuted. A co-defendant who admitted the killing which led to petitioner's conviction, on the other hand, has been granted a new trial simply because the attorney who was appointed to represent him was wise enough to challenge the instruction given by the trial court, concerning the burden of proving self-defense, in the state court of appeals.

Petitioner did not have his choice of counsel. Counsel who was appointed to represent him at trial and in the court of appeals failed to object to the instruction concerning the burden of proving self-defense, failed to object to the trial court's failure to instruct on an essential element of the crime of aggravated robbery--an element which was crucial to the charge of murder in the commission of aggravated robbery and to the jury's finding concerning the existence of an aggravating circumstance which would justify infliction of the death sentence. The jury was never told that aggravated robbery required proof that the defendant sought to take property from another without the consent of the owner. Consent was the only issue at trial, apart from the question of self-defense.

The Supreme Court of Ohio refused to determine whether counsel's failure to object to the instructions given or to take other action in behalf of petitioner constituted ineffective assistance of counsel. It refused to consider that issue on the sole ground that the issue had not been raised by the very attorneys whose competence was challenged for the first time in the Supreme Court of Ohio by newly-appointed counsel.

Whether an attorney's failure to challenge his own effectiveness on appeal is an adequate state procedural ground for barring appellate review on that question by newly-appointed

counsel is a substantial federal question not previously determined by this Court. This Court certainly has determined that there are circumstances where failure to comply with a state procedural rule does not insulate a conviction from challenge. E.g., *Williams vs. Georgia,* 349 U.S. 375; *Douglas vs. Alabama,* 380 U.S. 415. Where insistence upon compliance with the state procedural rule would impose an insurmountable obstacle to appellate review, despite the virtual impossibility of the state litigant to comply with the rule, the rule will not be permitted to deter review. See, e.g., *O'Connor vs. Ohio,* 385 U.S. 92.

In the instant case, petitioner could not conceivably have raised the issue of ineffective assistance of counsel at trial or in the state court of appeals where he was represented by the very counsel whose competency he sought to challenge in the Supreme Court of Ohio. That court's refusal to consider the issue, therefore, is based upon insistence upon compliance with a rule which petitioner was powerless to honor. Pursuant to the states' constitutional obligation to provide a proper forum for the assertion of federal constitutional claims, *Case vs. Nebraska,* 381 U.S. 336, the Supreme Court of Ohio was obliged to consider the claim of ineffective assistance of counsel on its merits.

III

This Court has already granted certiorari in two cases challenging the Ohio statutory scheme for imposition of the death penalty. Those cases challenge the limitations imposed upon consideration of mitigating circumstances by Ohio Revised Code §2929.04(B), and the removal of all decision-making authority concerning sentence from the jury resulting from application of Ohio Revised Code §2929.03. Petitioner will not repeat the arguments raised in those cases.

An additional defect in the Ohio statutory scheme which results in imposition of death sentences is, however, equally ripe for consideration. Ohio has adopted a statutory definition of the terms "reasonable doubt" and "proof beyond a reasonable doubt" which plainly relieves the state of the burden of proving guilt beyond a reasonable doubt. The new definitions, in effect in Ohio since January 1, 1974, are contained in Section 2901.05 (D) of the Ohio Revised Code which provides as follows:

> "'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

The new definitions represent a monumental, albeit subtle, departure from the most fundamental concept in the criminal law. The importance of the requirement of proof beyond a reasonable doubt has been eloquently affirmed by this Court:

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In Re Winship*, 397 U.S. 358, 363.

It will not satisfy due process to simply say that the state is required to prove guilt beyond a reasonable doubt if the definition of that term amounts to an expression of a far lesser standard of proof. The definition contained in the Ohio statute is, upon examination, not the traditional reasonable-doubt standard; it is not even a preponderance-of-evidence standard. It apparently derives from a gross misunderstanding of a few sentences contained in a decision rendered by this Court over 20 years ago. In *Holland vs. United States*, 348 U.S. 121, a jury instruction was challenged on the ground that it contained an erroneous definition of reasonable doubt. Reasonable doubt was defined by the trial court as:

> "The kind of doubt * * * which you folks in the more serious and important affairs of your own lives might be willing to act upon." 348 U.S. at 140.

This Court did not approve the definition, suggesting that it "would seem to create confusion," but it did not consider the error a basis for reversal.

What the Ohio legislature apparently ignored was the fact that the willing-to-act standard was offered, in *Holland*, as a definition of reasonable doubt--that relatively low degree of possible innocence which would be sufficient to warrant acquittal. The Ohio legislature converted the verbal expression of a very low degree of probability, i.e., reasonable doubt, into the verbal expression of the highest degree of probability required in any judicial proceeding, i.e., proof *beyond* a reasonable doubt.

What was deemed an acceptable, although not desirable, expression of the degree of probability which would justify acquittal has been converted by the Ohio legislature into the degree of probability which will justify conviction.

This transposition has been attempted by other courts with a uniform lack of success. Courts have unanimously rejected the willing-to-act definition of proof beyond a reasonable doubt upon virtually each occasion where it has been challenged. The reason is obvious and has been succinctly stated:

> "Being convinced beyond a reasonable doubt cannot be equated with being 'willing-to-act' * * * in the more weighty and important matters of your own affairs. A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary.
>
> "The jury, on the other hand, is prohibited from convicting unless it can say that beyond a reasonable doubt the defendant is guilty as charged. Thus there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him. *To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt."* *Scurry vs. United States*, 347 F.2d 468, 470 (D.C. Cir. 1965), *cert. denied*, 389 U.S. 883 (emphasis added).

By permitting petitioner's conviction and death sentence to rest upon a quantum of proof substantially less than that required by the due process clause of the Fourteenth Amendment, the decision below is not in accord with applicable decisions of this Court, including *In Re Winship, supra, Mullaney vs. Wilbur*, 421 U.S. 684, and *Hankerson vs. North Carolina*, ___ U.S. ___, 53 L.Ed.2d 1054.

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CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

GOLD, ROTATORI, MESSERMAN & SCHWARTZ CO., L.P.A.
By: Gerald A. Messerman
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari, Motion for Leave to Proceed in Forma Pauperis, and Affidavit in support of Motion for Leave to Proceed in Forma Pauperis have been forwarded to John T. Corrigan, Prosecuting Attorney, counsel for respondent, by depositing same in the United States Mail, with first-class postage, prepaid, to The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 18th day of October, 1977.

Counsel for Petitioner

Note: Pages 16 through 24 of this Appendix were not of reproducible quality. They are the Opinion of the Court in Ohio v. Williams (1977), 51 Ohio St.2d 112.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 34202

State of Ohio — APPEAL FROM

..... COMMON PLEAS ..... COURT

PLAINTIFF - APPELLEE — No. 193351 Cr.

-vs-

Robert Williams — JOURNAL ENTRY

.....

DEFENDANT - APPELLANT

DATE JUN 17 1976

This cause came on to be heard upon the pleadings and the ..... transcript of the evidence and the record in the ..... Court of Common Pleas ..... Court, and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the ..... Court of Common Pleas ..... Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This appeal follows the conviction by a jury of the defendant-appellant (defendant), Robert Williams, for aggravated murder and aggravated robbery.[1] Defendant was sentenced to death pursuant to the procedures mandated by Ohio Revised Code §2923.01(C)(D)(E) and §2929.04(A)(7) and (B).

Patricia Forgus testified that she, the defendant, and Hicks were together for most of the evening of April 5, 1975 (Tr. 52-55) before being joined by Kenneth Duncan (Tr. 55). According to Forgus' account of this incident, Duncan "started talking about a robbery" (Tr. 55). Defendant drove a car, with the other three as passengers, down Prospect where they spotted a little brown car (Tr. 56)

[1] Donald Hicks, Kenneth Duncan, and Patricia Forgus were also indicted on these charges, but each was tried in a separate proceeding.

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and someone commented, "This is the man's car". Duncan indicated that because the car was still on Prospect "the man" would have to go to another place to pick up some money (Tr. 101).

After observing the car, Forgus testified that they drove to a bar on St. Clair (Tr. 101) and eventually parked around the corner from it on a side street (Tr. 105-106). When a man was seen exiting the bar (Tr. 106) Duncan said, "That's him, and there he goes to the car" (Tr. 107). Forgus testified that defendant drove the car and followed the man's car to the man's home (Tr. 59-60, 107). When the man pulled into his driveway, defendant drove his car further down the street, parked it, and shut off the ignition (Tr. 60). Duncan and defendant left the car. Five or six minutes later, Forgus testified that she heard four shots (Tr. 61). Police officers on patrol in the area also heard the four shots and discovered decedent's body in the driveway at 11732 Lake Avenue (Tr. 157).

Duncan testified that he shot decedent, but claimed that the shooting was in self-defense (see Tr. 407-414). Police investigation and examination of the physical evidence disclosed: (a) police discovered a broken jar of peanut butter at the scene of the murder (Tr. 161); (b) that an unloaded .38 caliber revolver found on Edgewater was the murder weapon (Tr. 242, 354)[2]; (c) traces of peanut butter were found on the murder weapon (Tr. 366, 377); (d) peanut butter samplings were found on defendant's trousers and both peanut butter and untyped human blood beneath his fingernails (Tr. 370, 372-373); (e) glass particles belonging to a peanut butter jar were found on defendant's trousers (Tr. 372-373); and (f) traces of type A blood were found on defendant's trousers (Tr. 372)[3]. Additional facts relating to procedural matters

---

2/ Forgus testified that on April 4th, one day prior to the murder, she saw defendant with a "snub nose .38" (Tr. 65).

3/ Decedent's blood type was A positive (Tr. 38). Defendant's blood type is O positive (Tr. 382).

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raised by the assignments of error are delineated at the appropriate point below.

Defendant appeals assigning four errors. For reasons assessed below we find none well taken. We affirm.

Assignment of Error No. 1:

"The Evidence To Sustain A Verdict of Guilty; to a charge of aggravated murder, under Section 2903.01; O.R.C., as relates to the first count of the indictment was insufficient and contrary to law, as well as to the second count of the indictment for aggravated robbery."

The evidence indicates that: (a) defendant was aware of the intentions of Duncan to rob decedent; [4] (b) defendant was an active participant in the activities jointly performed with Duncan, Hicks, and Forgus; [5] (c) defendant was the driver of the automobile which followed decedent to his home; [6] (d) defendant was with Duncan when Duncan shot decedent with a gun of the same type as one seen in the possession of defendant the day before; [7] (e) samplings of the peanut butter and glass jar fragments found at the scene of the murder were taken from defendant's person; [8] and (f) blood was found under defendant's fingernails but the type was not identifiable. [9]

4/ Duncan talked about a robbery in the presence of defendant, Hicks, and Forgus while in the car (Tr. 55). By implication, defendant had to be aware of the statement of intention made by Duncan.

5/ See, e.g., Tr. 52, 54, 55, 56, 61, 107.

6/ Tr. 59, 60.

7/ Tr. 242, 354; see fn. 2.

8/ Peanut butter was found at the scene of the crime (Tr. 161) and on the murder weapon (Tr. 366, 377). Samples of peanut butter were also found beneath defendant's fingernails (Tr. 370) and on his trousers (Tr. 372-373). Samples of glass were taken fr defendant's trousers (Tr. 372-373). A broken peanut butter jar had been found at the sce of the crime (Tr. 161).

9/ Tr. 369-371; see fn. 3. There was a verification of human blood and its type on the defendant's pants (Tr. 371-372). The reference to decedent's blood as "Type A-positive" (Tr. 38) is not in any conflict with the finding that type A blood was found on defendant's trousers (Tr. 372). The term "positive" is with reference to the RH factor of the blood, not the type. Both decedent's blood type and that of the blood samplings taken from defendant's clothes were type A.

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There was sufficient evidence upon which reasonable minds could conclude, as the jury did, that defendant was guilty beyond a reasonable doubt of aggravated murder and aggravated robbery. Under these circumstances a reviewing court will not reverse the jury verdict as against the manifest weight of the evidence. State v. Swiger (1966), 5 Ohio St. 2d 151, 165.[10/]

The first assignment of error is not well taken.

Assignment of Error No. II:

"Misconduct of the prosecutor.

"A. Defendant was prejudiced by improper cross-examination statements of the prosecutor.

"B. Misconduct of the prosecutor in cross-examining witness regarding criminal record."

The prosecutor's questions upon the cross-examination of Kenneth Duncan relating to his membership in a black muslim group (Tr. 433) and his record of past criminal convictions (Tr. 434-435),[11/] even if improper,[12/] were not prejudicial in light of the overwhelming evidence of defendant's guilt and were, therefore, harmless error beyond a reasonable doubt, Harrington v. California (1969), 395 U.S. 250, 254, 23 L. Ed. 2d 284, 287, Chapman v. California (1967), 386 U.S. 18, 22, 17 L. Ed. 2d 705, 709.

10/ Even though there is no direct evidence or circumstantial evidence that defendant actually fired the shot, his association with and knowledge of Duncan's actions, coupled with Duncan's admission that he fired the shot that killed decedent (Tr. 414), are sufficient to support a finding that defendant was guilty as an aider and abettor of the murder.

11/ Later during cross-examination, the witness did admit that he had been convicted of robbery (Tr. 471). He had previously testified that he had not been convicted of any crime (Tr. 433-435). The interrogation with respect to prior convictions was obviously appropriate to test credibility. The group affiliation question seems clearly improper in the absence of some foundation, e.g., the principles of the group, or a showing that group discipline or group pressure was such that defendant was under such control that he would testify as directed.

12/ Our attention has not been drawn by the State to any point in the record indicating that it had evidence to serve as a foundation for the questions.

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The second assignment of error is not well taken.

Assignment of Error No. III:

"A. Sections 2903.01, 2929.03, and 2929.04 of the Ohio Penal Code permit arbitrary imposition of the punishment of death in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

"B. The imposition of the Death Penalty is unconstitutional, cruel, and unusual punishment in direct contravention of the Eighth and Fourteenth Amendments [sic] rights to equal protection of the law."

At the moment the relevant Ohio statutes apparently represent an effort to meet the standards to be drawn from the mixed opinion in Furman v. Georgia (1972), 408 U.S. 238, 33 L. Ed. 2d 346. This assignment of error is premature in light of the cases pending before the United States Supreme Court which may raise and re-determine the issues of death penalty constitutionality.[13/]

The third assignment of error lacks merit.

Assignment of Error No. IV:

"Defendentant [sic] was deprived of rights guaranteed by the Sixth Amendment of the United States Constitution, in being deprived of the effective assistence [sic] of counsel."

This assignment is directed at the propriety of a claimed ex parte hearing on a motion resulting in a court order for a blood sample taken from the defendant. Although the State's motion to withdraw a blood sample does not contain a clause indicating service of the motion upon defendant, the defendant does not affirmatively demonstrate that the hearing on the motion was conducted without the presence of defendant or his attorney.[14/] Because defendant has failed to point to a specific part of the record

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13/ Woodson v. North Carolina, Case No. 75-5491; Gregg v. Georgia, Case No. 74-6257; Proffitt v. Florida, Case No. 75-5706. All three cases were argued on March 31, 197

14/ The court order authorizing withdrawal of a blood sample from defendant only states that "this matter came on to be heard upon the written motion and brief of the Prosecuting Attorney of Cuyahoga County. . . ." Defendant did not file any narrative transcript or supplementary transcript to clarify this point or demonstrate his claim.

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to demonstrate the assigned error [App. R. 12(A)], we simply find it without merit. 15/

The fourth assignment of error is not well taken.

Affirmed.

15/ No demonstration was essayed to illustrate what counsel could have done if present. Under the circumstances the error, if any, was harmless beyond a reasonable doubt. However, the conclusion is not to be construed as condoning ex parte practice on blood sample motions.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-560

RECEIVED
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ROBERT WILLIAMS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

THOMAS J. SAMMON
Assistant Prosecuting Attorney
Attorneys for Respondent
The Justice Center
1200 Ontario
Cleveland, Ohio 44113

GERALD A. MESSERMAN
Attorney for Petitioner
1100 Ohio Savings Plaza
Cleveland, Ohio 44114

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Counter Questions of Law 2

1. A state procedural rule requiring the entering of an objection to an erroneous jury instruction prior to jury's retirement for deliberation serves a legitimate state interest sufficient to preclude the Supreme Court from reviewing a state supreme court's judgment, in which it declined to consider petitioner's claim that the trial court erred in its instruction to the jury on the issue of petitioner's burden with regard to the affirmative defense of self-defense on the ground that the petitioner failed to enter a timely objection to the trial court's charge.

2. No substantial federal question arises either under the Due Process Clause or this Supreme Court's decision in Mullaney v. Wilbur, 421 U.S. 684, where a state supreme court refuses to consider petitioner's claim that the trial court erred in instructing the jury that the petitioner must prove by a preponderance of the evidence the affirmative defense of self-defense where that instruction was subsequently held by the state supreme court to be erroneous in light of its interpretation of a state statute which places upon a criminal defendant the burden of merely going forward with evidence of an affirmative defense, since the petitioner failed to object to the trial court's instruction and since he also failed to raise the issue in the state intermediate court of appeals.

3. No substantial federal question arises on direct appeal in the United States Supreme Court where a state supreme court failed to consider petitioner's claims that he was denied effective assistance of counsel and that Ohio's statutory definition of the terms "reasonable doubt" and "proof beyond a reasonable doubt" fail to satisfy due process; where petitioner failed to raise these issues in the state intermediate appellate court; and where petitioner is currently raising these issues on appeal from a denial of his post-conviction relief petition in the state appellate court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

ROBERT WILLIAMS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of aggravated murder with specifications and aggravated robbery. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio affirmed the judgment of the trial court.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. A state procedural rule requiring the entering of an objection to an erroneous jury instruction prior to jury's retirement for deliberation serves a legitimate state interest so as to preclude the Supreme Court from reviewing a state supreme court's judgment, in which it declines to consider petitioner's claim that the trial court erred in its instruction to the jury on the issue of petitioner's burden with regard to the affirmative defense of self-defense on the ground that the petitioner failed to make a timely objection to the trial court's charge.

2. No substantial federal question arises either under the Due Process Clause or this Supreme Court's decision in Mullaney v. Wilbur, 421 U.S. 684, where a state supreme court refuses to consider petitioner's claim that the trial court erred in instructing the jury that the petitioner must prove by a preponderance of the evidence the affirmative defense of self-defense where that instruction was subsequently held by the state supreme court to be erroneous in light of its interpretation of a state statute which places upon a criminal defendant the burden of merely going forward with evidence of an affirmative defense, since the petitioner failed to object to the trial court's instruction and since he also failed to raise the issue in the state intermediate court of appeals.

3. No substantial federal question arises on direct appeal in the United States Supreme Court where a state supreme court failed to consider petitioner's claims that he was denied effective assistance of counsel and that Ohio's statutory definition of the terms "reasonable doubt" and "proof beyond a reasonable doubt" fail to satisfy due process; where petitioner failed to raise these issues in the state intermediate appellate court; and where petitioner is currently raising these issues on appeal from a denial of his post-conviction relief petition in the state appellate court.

STATEMENT OF THE CASE

History of the Case

On April 10, 1975 the petitioner Robert Williams, along with Kenneth Duncan, Donald Hicks and Patricia Forgus were indicted for the crime of aggravated murder with the specifications that the murder was committed while the defendants were committing an aggravated robbery (Ohio Revised Code, Section 2903.01) and for the crime of aggravated robbery (Ohio Revised Code, Section 2911.01).

On April 11, 1975, at his arraignment, petitioner entered pleas of not guilty to both counts of the indictment.

On May 12, 1975 petitioner stood trial before a jury which, after hearing the evidence presented by both the respondent and petitioner, and after being instructed in the law of the case, returned verdicts of guilty as charged.

On June 11, 1975, pursuant to the requisites of Ohio Revised Code, Sections 2929.03(D) and (E), the trial court sentenced the petitioner to death.

On June 17, 1976 pursuant to a properly perfected appeal the Court of Appeals for the Eighth Judicial District of Ohio in an unpublished opinion, affirmed the judgment of the trial court (Court of Appeals Case No. 34902).

On July 13, 1976, petitioner filed with the trial court a petition for relief after judgment pursuant to Ohio Revised Code, Section 2953.21 predicated upon the claim that the petitioner was denied effective representation of counsel at his trial.

On February 16, 1977 the trial court conducted a hearing on petitioner's petition for post-conviction relief. On March 21, 1977, the trial court denied and dismissed the petitioner's petition ruling that the "defense counsel's failure to file pre-trial motions to suppress evidence or to ask for a continuance were of not such failures to act herein as to constitute deprivation of effective representation of counsel; that had such motions been filed, their disposition favorable to the defendant could not arguably have disposed of the criminal charges against the defendant." (Cuyahoga County Case No. CR 19331).

On July 20, 1977, the Ohio Supreme Court affirmed petitioner's conviction (State v. Williams, 51 Ohio St. 2d 112, 364 N.E. 2d 1364 (1977).

On August 22, 1977 petitioner filed with the Court of Appeals for the Eighth Judicial District of Ohio an appeal from the trial court's judgment denying post-conviction relief. Petitioner's appeal currently is pending before that Court (Court of Appeals Case No. 37811).

Statement of Evidence

Harry Feldman, seventy-one years of age (R. 30), owned two taverns in the City of Cleveland, one located at 1216 Prospect, the other at 2402 St. Clair (R. 43). He resided with Evelyn, his wife of forty years, at 11732 Lake Avenue, Apartment No. 106, Lakewood, Ohio (R. 42). Mr. Feldman stood five feet five inches, weighed 178 pounds (R. 30), and had a permanent opening into his windpipe, the result of his voicebox being removed because of cancer of the larynx (R. 37, 47).

On Saturday, April 5, 1975, the day immediately prior to his death, Mr. Feldman followed his usual daily routine, that is, he visited his two taverns in the afternoon in order to provide them with sufficient change, returned to his apartment around 6:00 p.m. for dinner, and around 10:30 p.m. returned to the taverns to collect the cash receipts which he was to deposit the following Monday (R. 44). His only deviation from that routine on this particular day was a stop he made in the afternoon at Krogers Supermarket during which he purchased some orange juice and peanut butter for his wife (R. 43). He however failed to bring the peanut butter up with him to his apartment when he returned there for dinner having inadvertently left it in his automobile (R. 43).

About 6:00 p.m. on the evening of the same day, Patricia Forgus, Donald Hicks, and the petitioner were together at an establishment called the Shrimp Boat which is located at East 55th Street and Central Avenue in the City of Cleveland. There the three of them shot some pool and "snorted" some heroin (R. 52, 53). Around 11:00 p.m. they left the Shrimp Boat and went to the home of Robert Williams, the petitioner, which was located at East 38th Street and Central Avenue (R. 54). There they remained until about two o'clock when the suggestion was made by either Hicks or Williams to pick up "the guy" (R. 97) and returned to the Shrimp Boat in a green 1969 Chevrolet (R. 55), an automobile loaned to the petitioner, Williams, by a Ronald McLoughlin (R. 153).

At the Shrimp Boat, "the guy", a Lamon Kenneth Duncan joined these three and got into the Chevrolet with them, and sat in the rear seat (R. 55). Kenneth Duncan did not know Miss Forgus, but did know both the petitioner and Donald Hicks (R. 395). When Duncan got into the Chevrolet he started talking about a robbery in the presence of the other three (R. 55).

The petitioner was behind the wheel of the Chevrolet and at the direction of Kenneth Duncan, drove the automobile to the vicinity of 1216 Prospect Avenue, whereupon seeing a little brown car that belonged to Feldman, Duncan commented that "that's the man's car," and that the man would have to go to another place to pick up some money, since his car was still there (R. 101). Thereupon the petitioner drove the car over to St. Clair Avenue to Feldman's other tavern (R. 56).

Five minutes after their arrival at the tavern on St. Clair, Harry Feldman arrived (R. 101) and went inside. Petitioner, Duncan, Hicks, and Forgus waited for about thirty minutes before Feldman came out of the tavern and got into his car (R. 58). When Duncan saw Feldman exit from the bar, he said "that's the man" (R. 59, 107) and the petitioner, along with Duncan, Hicks and Forgus (R. 59) followed Feldman west on a freeway over to the vicinity of Edgewater Park and on to Lake Avenue (R. 59) in the City of Lakewood, Ohio.

On Lake Avenue, they followed Mr. Feldman's automobile all the way to the driveway of Mr. Feldman's apartment (R. 60). When Feldman pulled his automobile into his driveway, petitioner stopped his automobile further down Lake Avenue on the same side of the street that Feldman's driveway was on and along with Duncan got out of the car (R. 61) and left to rob Mr. Feldman (R. 62).

Five or six minutes later Miss Forgus, who remained in the automobile with Donald Hicks, hearing four gunshots jumped behind the wheel of the Chevrolet and began to drive the car away from the area of Mr. Feldman's apartment (R. 62). As she was about to leave this area Donald Hicks instructed her to make a U-turn and look for his friends (R. 63), which she did. Miss Forgus, in attempting to fine the petitioner and Duncan, drove around the block bounded by Lake and Cove and Edgewater Avenues and West 117th Street (R. 64).

Meanwhile, at approximately the same time Miss Forgus heard four shots, so also did Officers O'Grady and Biscotti of the Lakewood Police Department who were patroling the area of West 117th Street and Lake Avenue at 3:20 a.m. (R. 157, 197, 173). Upon hearing these shots, they drove down Lake Avenue to investigate and eventually found Harry Feldman on his back in the driveway with his head to the northeast and his feet to the southwest (R. 157-158). Patrolman O'Grady in searching Mr. Feldman found a fully loaded revolver (State's Exhibit 14) in his right overcoat pocket (R. 159). Patrolman O'Grady further noticed that a fence adjacent to the east side of the driveway was matted down and had what appeared to be peanut butter on it (R. 161). He further observed on the driveway by this fence a lid to a Kroger peanut butter jar (R. 162, State's Exhibit 22). He also observed strewn on the driveway some glass particles (R. 164). The peanut butter on the fence, the glass particles, and the lid were collected by Detective Gates of the Lakewood Police Department and submitted to the Ohio State Bureau of Criminal Identification (R. 231, 232, 245).

Subsequently, an ambulance arrived to take Mr. Feldman to the Lakewood Hospital where he expired (R. 214). Patrolman Boomer, the ambulance driver, inventoried Mr. Feldman's personal effects and found $439.93 on his person (R. 215).

Mr. Feldman was then transferred to the Cuyahoga County Morgue where an autopsy was performed by Dr. Charles Hirsch, Deputy Coroner for Cuyahoga County. Dr. Hirsch's autopsy findings were that Mr. Feldman was shot four times. Three shots had entered his back (R. 30-31). One shot, which was the fatal one, entered his right armpit and came to rest in his left side of the chest above the breast (R. 30-31); when this shot entered him, Mr. Fedlman's arm had to be at his side (R. 36).

Mr. Feldman also had alcohol in his blood and urine which indicated he was in the subclinical state of intoxication (R. 36). His blood type was A positive (R. 38).

As Miss Forgus and Mr. Hicks were circling the area looking for the petitioner and Kenneth Duncan, they were observed by a Jeffrey Summers who was in his automobile monitoring that morning's police activity on his Citizens Band radio (R. 178). Mr. Summers had also observed a male run out

from an apartment building on Edgewater Drive running after the automobile driven at this time by Miss Forgus (R. 179). When this male who was chasing the car driven by Miss Forgus saw Mr. Summers, he ran between some apartments on Cove Avenue (R. 180). Mr. Summers relayed this information to the Lakewood Police along with a description of the male running behind the car (R. 180).

Based on this information, Patrolman Incze and Patrolman Biscotti stopped the car Forgus and Hicks were in, in the area of 12700 Lake Avenue at approximately 3:30 p.m. and arrested both occupants (R. 191).

At approximately 3:45 a.m., Mr. Charles Wilhelm, a Plain Dealer route man, was delivering papers to the Lakewood Manor Hotel at 11820 Lake Avenue when he observed the night clerk was not behind the desk, an oddity since Mr. Wilhelm was accustomed to seeing him there when he would deliver his papers (R. 208). Thinking something might have happened to him, since he walked on canes, Mr. Wilhelm looked around for him and observed him and a black male come out of one of the rooms (R. 208). Seeing this, Wilhelm left for his next stop, but was flagged down by the police who inquired of him and to whom he related what he had seen.

Based on this information, Patrolman Biscotti went to the Lakewood Manor where he found Kenneth Duncan at approximately 4:30 a.m. He placed Kenneth Duncan under arrest (R. 202).

At approximately 6:15 a.m., acting on a description broadcast to members of the Lakewood Police Department, Patrolman Fensel and Detective Gates arrested the petitioner, who fitted the broadcast description, in the area of 11820 Edgewater Drive (R. 222-223).

After the arrest of Williams, Duncan, Hicks and Forgus, the Lakewood Police Department obtained a written statement from Miss Forgus wherein she implicated herself along with Williams, Duncan, and Hicks in the plan to rob Mr. Feldman (R. 295).

Detective Robert Holmok also obtained fingerprints from each person arrested (R. 291, 292) and also their blood samples (R. 295, 296). Detective Gary Gates obtained petitioner's, Duncan's and Hick's clothing plus the fingernail scrapings removed from the petitioner (R. 234, 244, 245).

After daybreak on the sixth, the Lakewood Police Department conducted a search for the weapon used in the murder of Mr. Feldman and for any other

evidence which may have proven significant. Detective Gates was charged with collecting all this evidence (R. 230, 231). Found at 11833-11835 Edgewater Drive, approximately one block from the scene of the murder, in a window sill was a fully loaded .357 magnum (R. 239, State's Exhibit 29 and 29A). Found alongside of a guilding at 12021 Edgewater Drive and behind some bushes was a .38 caliber revolver unloaded (R. 242, State's Exhibit 10). This had mud and brown substance on it (R. 272).

All the evidence that was found on and in the vicinity of the scene of Harry Feldman's murder was submitted to the Ohio Bureau of Criminal Identification along with the petitioner's clothing and the clothing of Duncan and Hicks, and the blood samples and fingerprints of the petitioner, Duncan, Hicks, and Forgus and petitioner's fingernail scrapings (R. 245). From an analysis of all the items, the following results were obtained: Henry Dombrowski, the Bureau's Supervisor, determined that the weapon that fired the fatal bullets was the .38 caliber revolver found at 12021 Edgewater (State's Exhibit 10, R. 354). (Miss Forgus had identified this weapon as the one the petitioner had obtained a day or two prior to Mr. Feldman's death, R.65); the substance that was found on this weapon was peanut butter (R. 366, 377); the substance taken from beneath the petitioner's fingernails was also peanut butter and blood (R. 370); the substance found on petitioner's trousers was human blood Type A (R. 373); the glass particles found on petitioner's trousers were identical with the glass particles from the Kroger peanut butter jar lid found in Mr. Feldman's driveway (R. 372-373); the substance found on petitioner's jacket was peanut butter and human blood (R. 374); the substance removed from the fence adjacent to Feldman's apartment driveway was peanut butter (R. 378); a fingerprint removed from the cylinder of the fully loaded .357 magnum (State's Exhibit 29) was the fingerprint of Kenneth Duncan (R. 335); the blood types of the petitioner, Duncan, Hicks, and Forgus were O, A, O, and O respectively (R. 382).

Petitioner called only one witness, the co-defendant Kenneth Duncan. He testified that he shot Harry Feldman but that he shot him in self-defense when Feldman refused to pay him money Feldman owed him and only after Feldman pulled a weapon out of his coat (R. 401-411).

The trial court charged on the issue of self-defense, but delivered to

the jury a charge which placed upon the petitioner the onus of proving the affirmative defense of self-defense by a preponderance of the evidence.

The statement of law which had been the law of Ohio since 1871 was overturned by the Ohio Supreme Court when it decided approximately one year after petitioner's conviction in an unrelated case that "a defendant in a criminal case involving the affirmative defense of self-defense has only the burden of going forward with the evidence." (State v. Robinson, 47 Ohio St. 2d 103, 351 N.E. 2d 88).

REASONS FOR DENYING THE WRIT

1. A state procedural rule requiring the entering of an objection to an erroneous jury instruction prior to jury's retirement for deliberation serves a legitimate state interest so as to preclude the Supreme Court from reviewing a state supreme court's judgment, in which it declined to consider petitioner's claim that the trial court erred in its instruction to the jury on the issue of petitioner's burden with regard to the affirmative defense of self-defense on the ground that the petitioner failed to enter a timely objection to the trial court's charge.

Ohio's Criminal Procedural Rule 30, which is modeled in part on Federal Criminal Rule 30, precludes a party from assigning as error the trial court's giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict.

The purpose of the rule is clear. To permit counsel to sit back and not to object to an erroneous jury instruction and then to reap benefits afterwards on the appellate level would be to nurture grave miscarriages of justice. As stated by the Ohio Supreme Court:

> "Any other rule would relieve counsel from any duty or responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence to mislead the court into commission of error. State v. Driscoll, 138 N.E. 376 (1922).

On the other hand, to compel a party to object timely to an improper jury instruction is to provide the proper climate wherein the seeds of orderly, fair, and efficient administration of justice are allowed to grow and from which are harvested the fruits of substantial justice for all concerned.

By immediately apprising the trial court of the objection and the reasons supporting the objection, counsel gives the court the opportunity to issue the proper instructions to the jury and to avoid impending error.

This Court has held in Henry v. Mississippi, 379 U.S. 443 (1965), that:

> "A litigant's procedural defaults in state proceedings do not prevent v.. ·ication of his federal rights unless the st·te's insistence on compliance with its procedural rule serves a legitimate state interest." (at 447).

It is manifest that a "legitimate state interest" is served by the promulgation of Criminal Rule 30.

Therefore, inasmuch as the judgment of the Ohio Supreme Court rests on "adequate procedural state grounds" this Court should decline to review the judgment of the state court (Henry v. Mississippi, 379 U.S. 443 at 446).

2. No substantial federal question arises either under the Due Process Clause or this Supreme Court's decision in Mullaney v. Wilbur, 421 U.S. 684, where a state supreme court refuses to consider petitioner's claim that the trial court erred in instructing the jury that the petitioner must prove by a preponderance of the evidence the affirmative defense of self-defense where that instruction was subsequently held by the state supreme court to be erroneous in light of its interpretation of a state statute which places upon a criminal defendant the burden of merely going forward with evidence of an affirmative defense, since the petitioner failed to object to the trial court's instruction and since he also failed to raise the issue in the state intermediate court of appeals.

The Ohio Supreme Court refused to consider petitioner's claim that he was prejudiced by an erroneous jury instruction given by the trial court on the issue of self-defense.

Admittedly, the trial court's instruction on the law of self-defense was erroneous in light of an Ohio Supreme Court decision rendered on July 21, 1976, approximately one year after petitioner's conviction. (State v. Robinson, 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976).

In Robinson, supra, the Ohio Supreme Court interpreted Ohio Revised Code, Section 2901.05 subsection (A) to mean:

> "In a criminal case involving the affirmative defense of self-defense, the defendant has only the burden of going forward with the evidence of a nature and quality sufficient to raise that defense, and does

not have the burden of establishing such defense by a preponderance of the evidence." (Syllabus of State v. Robinson, supra).

Contrary to what the petitioner states, the Ohio Supreme Court in construing Revised Code Section 2901.05 subsection (A) did not hold that the state must prove the absence of self-defense beyond a reasonable doubt.

The Ohio Supreme Court refused to consider petitioner's claim of error on the grounds that he failed to object to the trial court's charge under Ohio Criminal Rule 30 and because petitioner failed to raise the issue in the intermediate court of appeals.

In arriving at its decision to refuse to consider petitioner's claim of error the Ohio Supreme Court adhered to past precedent. (See State v. Williams, 51 Ohio St. 2d 112, at 117 for a catalogue of Ohio Supreme Court decisions holding the same).

In addition the court was impressed with the overwhelming amount of evidence which underscored the petitioner's guilt.

> "Moreover, in so holding this court finds no miscarriage of justice in the instant cause. The exculpatory testimony of appellant's witness finds little support in the record. Through an array of 19 witnesses and 51 exhibits, the state presented convincing evidence indicative of appellant's guilt." (State v. Williams, supra, at 118).

Petitioner seeks now to raise to the level of a substantial federal question the trial court's instruction on the affirmative defense of self-defense by attempting to bring it within the framework of Mullaney v. Wilbur, 421 U.S. 684. However, petitioner's approach must fail in light of this Court's recent decision in Patterson v. New York, 97 S. Ct. 2319 (1977). This Court in Patterson held that New York did not violate the Due Process Clause by requiring the defendant to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance which would reduce the crime of murder to manslaughter, as long as the State had to carry the burden of proving each and every element of the crime of murder beyond a reasonable doubt. (Patterson v. New York, supra, at 2325).

In addition this Court rejected the proposition that a state "must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses. . ." (Patterson v. New York, supra, at 2327.)

In the instant case the State had to prove each and every element of the crimes of aggravated murder and aggravated robbery by evidence beyond a

reasonable doubt. The jury was instructed that the petitioner was required to prove by a preponderance of the evidence the affirmative defense of self-defense.

Even though the trial court's instruction was rendered erroneous, post facto, no substantial federal question is created by the state supreme court's refusal to entertain petitioner's claim of error on the basis of his non-compliance with Ohio Criminal Rule 30 and his failure to prosecute the issue in the intermediate court of appeals as error since the instruction as given by the trial court does not come within this court's decision in Mullaney v. Wilbur, supra, by virtue of this Court's recent decision in Patterson v. New York, supra.

3. No substantial federal question arises on direct appeal in the United States Supreme Court where a state supreme court failed to consider petitioner's claims that he was denied effective assistance of counsel and that Ohio's statutory definition of the terms "reasonable doubt" and "proof beyond a reasonable doubt" fail to satisfy due process; where petitioner failed to raise these issues in the state intermediate appellate court; and where petitioner is currently raising these issues on appeal from a denial of his post-conviction relief petition in the state appellate court.

The Ohio Supreme Court refused to consider petitioner's claim that he was denied effective assistance of trial counsel since he failed to raise this issue in the state appellate court, but raised that issue for the first time in the supreme court; likewise, the Ohio Supreme Court refused to review petitioner's claim that he was convicted under a constiutionally diluted definition of "reasonable doubt" and "proof beyond a reasonable doubt" since he did not object to this definition at the trial level as required under Ohio Criminal Rule 30 and furthermore did not litigate the issue in the intermediate appellate court.

The Ohio Supreme Court deemed petitioner's attempts at raising these issues for the first time contrary to Ohio procedural law. (State v. Williams, supra, at 117 and 119).

Petitioner, however, was not foreclosed by Ohio Law from prosecuting these claims on the state level and, in fact, did raise them in a post-conviction relief hearing pursuant to Ohio Revised Code, Section 2953.21 in the trial court.

There his claims were rejected and relief was denied, but he has appealed the trial court's judgment denying him relief under Ohio Revised Code, Section 2953.21 in the state appellate court, which matter is presently pending there. If he should not prevail in that court, he has available to him a remedy in the Ohio Supreme Court on appeal.

Inasmuch as these issues are currently being reviewed in the state appellate court for the first time, they are improvidently being urged in this Supreme Court on direct appeal.

Not only are these issues improvidently raised in this court on direct appeal, but the Ohio courts of review have not construed the meaning of the state statute defining the terms "reasonable doubt" and "proof beyond a reasonable doubt."

This Supreme Court has held that "state courts are the ultimate expositors of state law "and this Court is bound by state court constructions." (Mullaney v. Wilbur, 421 U.S. 684 at 691). Unless this court decides to act contrary to precedent, it certainly cannot pass on the constitutionality of a state statute which has not yet been construed by the state court.

CONCLUSION

We respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

BY: Thomas J. Sammon

THOMAS J. SAMMON
Assistant Prosecuting Attorney
Attorneys for Respondent
The Justice Center
1200 Ontario
Cleveland, Ohio 44113

PROOF OF SERVICE

I, JOHN T. CORRIGAN, Prosecuting Attorney for Cuyahoga County, Ohio, one of the Attorneys for the State of Ohio, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 16th day of November, 1977, I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari on the Petitioner's Attorney, Gerald A. Messerman, 1100 Ohio Savings Plaza, Cleveland, Ohio, 44114, in a duly addressed envelope, with first class postage prepaid.

John T. Corrigan

Prosecuting Attorney of
Cuyahoga County, Ohio

APPENDIX

Ohio Revised Code, Section 2901.05(A)

"2901.95 Burden and degree of proof

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused."